Original

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-258
	)	
Indecent Programming and Other Types of Materials on Cable Access Channels	)	

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

Daniel L. Brenner
Diane B. Burstein

ITS ATTORNEYS
1724 Massachusetts Ave., NW
Washington, DC 20036
(202) 775-3664

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COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry, representing cable television system owners and operators and cable program networks. NCTA's members also include equipment suppliers and others interested in or affiliated with the cable industry.

INTRODUCTION AND SUMMARY

In the Cable Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act" or "Act"), Congress adopted several provisions addressed to operators' ability to prohibit "indecent" programming on cable access channels. Congress at the same time retained the general prohibitions, found in 47 U.S.C. Sections 531(e) and 532(c)(2), on cable operators exercising editorial control over the content of programming transmitted on access channels.

Specifically, with respect to leased access programming, Congress in Section 10 of the Act provided that cable operators could prospectively adopt a policy prohibiting on leased access channels programming that the operator "reasonably believes" describes or depicts "sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards".[1/] The Commission is charged with adopting rules to implement the requirement that if an operator chooses not to prohibit such programming, it must place it on a single channel that is blocked unless a subscriber requests access to the channel in writing.

The Act takes a somewhat different approach with respect to programming on public, educational, and governmental access channels. The Act requires the Commission to promulgate regulations to enable an operator to prohibit the use of PEG access channels for any programming which contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." But unlike the treatment of indecent programming on leased access, the Act does not require an operator, if it chooses not to prohibit the use of PEG

1/ This provision took effect on December 4, 1992. The Act also modified Sec. 612(h) to allow the "cable operator" to prohibit service which is "obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States."

channels for such programming, to take any steps to block subscriber access.

Finally, Congress also amended the 1984 Cable Act, 47 U.S.C. Section 558, to remove cable operators' immunity for liability for transmission of obscene programming on access channels.[2/]

The Act's provisions on their face are deceptively simple. But the scheme that Congress has established raises numerous complex constitutional and practical problems. In mandating access, limiting editorial control and removing an operator's protection against obscenity charges for access programming, the Act has set up a contradictory scheme that puts operators in a difficult if not impossible position. The only way to make this scheme work is to enable operators to rely on certifications from users of access channels and to immunize operators from liability if they rely on such certifications.

COMMENTS

I. The Mandatory Access Scheme Established By Congress Raises Serious Constitutional Concerns and Must Be Implemented to Minimize These Concerns

The entire concept of mandatory access channels is fraught with constitutional difficulties. From a cable operator's perspective, access channels strip the operator of control over its channel capacity and reduce the number of channels available for programming. These constraints have been found to violate

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2/ This provision also went into effect on December 4, 1992.

the First Amendment.[3/] These constitutional difficulties are only compounded by the fact that operators are now liable for obscene programming shown by others. The fact that operators may now elect to prohibit certain programming is no comfort if it means that an operator must prescreen all programming in order to avoid liability.

The problems caused by prohibiting operators from exercising editorial discretion over their channels are well known. In fact, the legislative history of the Act recognizes that the leased and PEG access requirements of the 1984 Cable Act have caused operators to allow programming on their systems that they and their subscribers may find objectionable.[4/] But rather than eliminating entirely the access requirement in order to avoid these intrusions on editorial discretion, the Act imposes a different -- and troublesome -- remedy. It allows operators to deny access to some speech -- but only to speech that the government defines as objectionable. And if the operator chooses, in any event, to carry such speech on leased access

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3/ E.g., Group W Cable, Inc. v. City of Santa Cruz, 669 F.Supp. 954 (N.D.Cal. 1987); Century Federal, Inc. v. City of Palo Alto, 710 F.Supp. 1552 (N.D.Cal. 1987). But see Erie Telecommunications, Inc. v. City of Erie, 659 F.Supp. 580 (W.D.Pa. 1987) (upholding access requirement over First Amendment challenge).

4/ See Statement of Senator Thurmond, 138 CONG. REC. S648 (daily ed. Jan. 30, 1992) ("It is truly disturbing that cable companies are forced to give [objectionable] programs a public forum and that cable subscribers must accept this porn as part of basic cable.")

channels, the Act requires that the operator take affirmative steps to limit access to constitutionally-protected speech. This direct regulation of content is on very shaky constitutional grounds. Indeed, every court that has examined the constitutionality of restrictions on "indecent" speech on cable has found those restrictions to be invalid.[5/]

Specifically, the Act requires the operator to place indecent programming on a single channel and block the channel unless the subscriber requests access in writing. The Act does not specify what sanctions may be imposed on the operator for failure to comply with this requirement.

Under the established case law, supra, if the operator were to decide, in its editorial discretion, to carry these assumably "indecent" programs, the operator would be protected against liability under the First Amendment. Accordingly, an operator should not be punished for the mere carriage of indecent programming on leased access channels even if it fails to place it on a separate channel or fails to block the channel. Instead, the Commission should only inquire into whether the operator is willfully and repeatedly ignoring the procedures established by Congress before any sanctions are considered.

5/ See Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), aff'd. mem., 480 U.S. 926 (1987) (finding that the Utah Cable Television Programming Decency Act violated the First Amendment as being overbroad and vague); Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Home Box Office v. Wilkinson, 531 F. Supp. 986 (C.D.Utah 1982); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (N.D. Utah 1982).

It is the procedural failure of an operator, not the underlying content, that should be the target of any enforcement proceeding.

II. The Commission Should Adopt Workable Regulations that Protect Operators Against Liability

We recognize that it is nonetheless the Commission's task to adopt regulations that implement this scheme. The rules must accommodate the legislative objectives of protecting operators against on the one hand having to accept all programming, no matter how objectionable to the operator, and on the other hand having to screen all programming that access programmers desire to present in order to censor programming that the government deems "indecent." We believe that the contradictory purposes of the Act can be achieved only if the Commission's rules ensure that all operators who rely on programmer characterizations of the nature of their programming are protected against liability.

A. Leased Access

The NPRM seeks comment on several practical aspects of implementing the new requirements on indecent programming on leased access. These issues are addressed below.

1. Definition of "Indecent" Programming

The Act does not specifically define the nature of programming that would be considered "indecent" on leased access channels, and which, if an operator chose not to prohibit, must

be provided on a separate, blocked channel. Nevertheless, as the Notice points out, the Act does specify the programming that an operator may itself choose to prohibit -- that which the operator "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." The Commission proposes to track this language in its regulations explaining what programming an operator must provide on blocked leased access channels, but also to add language modifying "contemporary community standards" by reference to "the cable medium."[6/]

We agree with the Commission that both definitions should be the same. An operator should be able to avoid altogether the requirement that it provide a separate blocked channel if it chooses simply not to allow the provision of "indecent" programming. If the Commission's definition of "indecency" were broader than that which the Act allows an operator to prohibit, an operator would be in the untenable position of being forced to

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6/ While we do not believe, consistent with the discussion above, that regulation of indecency on cable is constitutionally permissible, we nonetheless endorse the Commission's attempt to minimize these constitutional difficulties by including reference to standards applicable to the "cable medium". Although the addition of this language may not eliminate the constitutional difficulties of the statute, it nonetheless recognizes that what may properly be regulated on broadcast stations, or even telephone communications, for that matter, is not determinative of what speech may be regulated in what manner on cable television.

set up a separate blocked access channel for programming that it could otherwise not exclude.

2. Program Provider Responsibility for Identifying Indecent and Obscene Programming

In paragraph 10 of the NPRM, the Commission recognizes that the language of the statute requires program providers to inform operators whether their programming is indecent. We agree that in order for this provision to work, it is critical that an operator not be required by the rules to review programming to be provided over the access channels to determine their suitability under a governmentally prescribed standard. The only practical means of reconciling the indecency and no-censorship provisions of the Act is to ensure that access programmers -- and not operators -- are responsible for making these judgments.

The operator's only responsibility is to place programming that has been identified by the lessee as "indecent" on a separate blocked channel. If a program provider fails to identify indecent programming as such, the provider -- and not the operator -- should be liable under the Act.

We concur with the Notice's[7/] suggestion that all operators -- regardless of whether they adopt a policy prohibiting indecent leased access programming -- may require lessees to certify that their program is neither indecent nor obscene. Operators for the

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7/ See NPRM at para. 12.

first time are liable for the presentation of obscene programming; they also have the affirmative obligation to set up blocked channels for indecent programming. Certification from the programmer therefore is essential if an operator is to protect himself against liability and comply with the blocking requirement, regardless of whether an operator has a voluntary policy of prohibiting indecent programming.

This should not preclude an operator from monitoring or prescreening programming to identify indecent or obscene programming if it chooses to do so. First, if it has adopted a policy of prohibiting certain indecent programming, the operator may want to determine for itself whether particular programs should be prohibited. Under Section 532(h), an operator may prohibit programming that it "reasonably believes" falls within the prescribed potentially offensive activities. The Commission should make clear that this "reasonable belief" may be based on the operator's review of the programming or on an operator's receipt of a certification from the programmer.[8/]

8/ The Commission should also make clear that an operator would not violate the Act or the Commission's rules if it prohibited some "indecent" programming, and allowed other "indecent" programming on a single blocked channel. The language of the Act contemplates that an operator will have a choice between prohibiting and blocking such programming. And the Act can be read to indicate that an operator may both prohibit some programming and choose not to prohibit other programming that the operator instead would place on a blocked channel.

Second, an operator, faced with the burden of providing a separate blocked channel for "indecent" programming, might want to determine whether a program identified by the provider as indecent really meets the definition and really must be placed on a separate channel.

Finally, because the Act makes operators liable for obscene programming, an operator may need to retain the right to preview access programming to ensure that in no circumstances is it transmitting something obscene. As indicated below, however, a better approach would be to rule that operators who have relied on a program provider's certification that its programming is not obscene cannot be held liable if the programming is subsequently determined by a court to be obscene.

3. Programmer Notice

The Commission also seeks comments on the proper notice to be provided to operators about the nature of the program content. The proposed regulations contain a seven day notice provision. We believe that seven days is an insufficient period of time in which to accomplish what the Act mandates. An operator after receiving notice must have an opportunity to establish a blocked channel if necessary. Subscribers must have sufficient time to request access to that channel in writing. And operators must have additional time to unblock that channel for interested subscribers. For all these reasons, we would propose that after an initial request for airing indecent leased access programming, an operator have a minimum of 60 days to establish the channel

and notify subscribers. Thereafter, we would propose that a minimum of 30 days' notice be provided to satisfy requests for blocking of service.

We believe that this notice must be in writing. An operator should have a written record of programmer certifications in order to facilitate resolution of any later disputes. However, we do not believe that the Commission should impose burdensome record retention requirements. Instead, the FCC should set a short time limit on recordkeeping -- and adopt a time period for bringing complaints to the Commission that dovetails with this recordkeeping requirement.[9/]

4. Operator Immunity From Liability

The Notice properly raises the issue of whether operators should not be liable where they do not receive notice within a prescribed period, or if they do not receive any notice. The Commission should make clear that operators are relieved of liability for presenting indecent or obscene programming under such circumstances.

9/ Under a new provision of the Act, to be codified at 47 U.S.C. Section 532(c)(4)(A)(iii), the Commission is to establish procedures for expedited disputes between access programmers and operators. In the course of adopting rules implementing this provision, the Commission should adopt a short time frame for resolving disputes between programmers and operators arising from the indecent leased access provisions as well.

This approach is similar to that contained in the "dial-a-porn" provisions of the Communications Act upheld in Dial Information Services v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), cert. denied. ____ U.S. ___ (1992). That case provides that no cause of action can be brought against a phone company if access is permitted in good faith reliance on the lack of message provider certification or if the carrier had insufficient time to restrict access.

The Commission's rules should also relieve operators from liability where they rely in good faith on notification that has been provided by the programmer. If, for example, a programmer claims that its program is not obscene or indecent, and hence an operator in reliance provides that programming on an unblocked channel, the operator must be protected against liability, even if the programmer was incorrect. Otherwise, an operator would be forced to prescreen every program, regardless of the notification received from the programmer, contrary to the intention of the Act.

Finally, the Commission should rule that reliance on a programmer certification (or lack thereof) in accordance with the FCC rules should immunize an operator against any Federal or state liability for presentation of obscene programming. The FCC should make clear that the requisite intent to transmit obscene programming cannot be found where an operator relies on an access programmer certification that its programming is not obscene. Operators also should be permitted to require indemnifications

from programmers against any liability for the transmission of indecent or obscene programming.

5. Appropriate Blocking Procedures

In paragraph 9 of the NPRM, the Commission seeks comments on the appropriate blocking measures and procedures relating to access. Given the differing circumstances in which leased access channels may be presented by operators, we believe that operators should be given the maximum flexibility to determine the most feasible method of blocking access.

If an operator is required to offer a blocked channel, the level of subscriber interest in that channel, as well as system design, factor into the type of blocking mechanism -- e.g., scrambling or traps -- most appropriate for that system. Given the variety of ways in which leased access may be packaged and blocked, it makes little sense for the Commission to prescribe in advance a specific rule dictating the method for channel blocking. So long as the blocking mechanism used by the operator is effective in preventing the receipt of programming, it should be acceptable.

An operator also should be allowed to charge either blocked leased access channel programmers or subscribers for the cost of unblocking the channel. Unblocking may require an operator to send a service technician to the subscriber's home in order to take out traps or to supply the subscriber with additional equipment. These costs should not be borne by the operator or by subscribers generally. In addition, the Commission must take

into account the costs associated with complying with the blocking requirements of Section 10 of the Act in its separate proceeding addressed to ratemaking for leased access channels.[10/]

B. PEG Access

As the Notice itself expresses, removal of operators' immunity from liability for transmission of obscene programming on access channels raises particularly troubling problems for the administration of PEG access channels. Operators may be even farther removed from users of that channel, but are equally liable for the channel's content.

Operators often have no involvement in PEG channels that are run by local access organizations. But under the new law, cable operators now could be liable for the presentation of obscene programming, regardless of whether they have any involvement in the access channel at all. This potential for liability could well force operators to pre-screen all material to be shown on access channels. This problem is made worse by the frequent airing of live programming on access channels, for which pre-screening would be difficult if not impossible.

The Notice proposes that to protect operators who wish to enforce a policy of prohibiting "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful behavior" on PEG channels, they may require certifications from

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10/ To be codified at 47 U.S.C. Section 532(c)(4)(A).

access users or operators that no material fitting into any of these categories would be shown. We believe that this is the minimum level of protection required for an operator. Operators should be entitled to other layers of protection as well, such as indemnification from liability, and requiring access users to post a bond in appropriate circumstances.

Finally, while reliance on a PEG channel programmer certification should protect an operator from liability for transmission of obscene programming, an operator should also be entitled, if it chooses, to review programming for the limited purpose of determining whether it should be prohibited as falling into the proscribed categories.

CONCLUSION

The new access channel provisions adopted by Congress in the 1992 Cable Act proport to give operators some, albeit limited, control over the content of those channels. At the same time, Congress has exposed operators to obscenity liability for access channel content. These and the other conflicting objectives of the mandatory access channel provisions should be reconciled by minimizing operators' responsibility for policing access channels and instead making clear that access programmers are responsible for their program content. Operators are required by the Act and

their franchises to set aside channels for the use of others -- they should not also be required to do so only at their peril.

Respectfully submitted,

NATIONAL CABLE TELEVISION ASSOCIATION, INC.

By _____
Daniel L. Brenner

By _____
Diane B. Burstein

ITS ATTORNEYS
1724 Massachusetts Ave., NW
Washington, DC 20036
(202) 775-3664

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